

November 6, 2014

Theodore J. Reynolds
Assistant City Attorney
City of Anaheim
200 S. Anaheim Blvd., Suite 356
Anaheim, CA 92805

Re: Your Request for Advice
Our File No. A-14-180

Dear Mr. Reynolds:

This letter responds to your request for advice on behalf of the City of Anaheim and Anaheim City Planning Commissioner Victoria Ramirez regarding the conflict of interest provisions under the Political Reform Act¹ (the “Act”) and Government Code Section 1090 et seq. (“Section 1090”). The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71). This letter is based on the facts presented. Please note that the Commission does not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct, which may have already taken place.

We have forwarded your request to the Attorney General’s Office and the Orange County District Attorney’s Office and we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTIONS

1. Under the Act, may Planning Commissioner Ramirez make, participate in making, or influence the decision involving her application before the City for a Mills Act contract involving her personal residence?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. Under Section 1090, may the City enter into a Mills Act contract with the Planning Commissioner?

CONCLUSION

1. No. However, the Act provides a narrow exception allowing an official to represent her own personal interests, the Planning Commissioner may appear before the Planning Director and/or City Attorney as any other member of the public and represent herself on matters related solely to the Mills Act application concerning her wholly-owned private residence. However, Planning Commissioner Ramirez may not attempt to use her official position and may not purport to be acting in her official capacity as City Planning Commissioner to influence the decision in her contacts with the Planning Director or the City Attorney.

2. Yes. Section 1090 does not prevent the City from entering into a Mills Act contract with Planning Commissioner Ramirez.

FACTS

Planning Commissioner Ramirez recently acquired a house located within a local historic district designated by the Anaheim City Council. The Planning Commissioner intends to occupy the house as her principal residence. She has submitted an application to the City to enter into a Historical Property Preservation Agreement commonly known as a “Mills Act Contract” under the City’s Mills Act Program.

California legislators adopted the Mills Act in 1972. The Mills Act permits cities to enter into a contract with the owner of a qualified historical property who agrees to rehabilitate, restore, preserve, and maintain the property in exchange for property tax reductions. The amount of tax savings varies, but Anaheim’s Mills Act Agreements may result in up to 60 percent property tax savings per year.²

Anaheim’s Mills Act Program was approved by the City Council in 2000. The City Council did not reserve the power to make or approve Mills Act Contracts when it adopted the Mills Act Program. The sole authority to administer the Mills Act Program and to make, prepare and execute Mills Act contracts was initially delegated to the Executive Director of the City’s Community Development Department. On October 21, 2014, the City Council transferred the sole authority to make, prepare and execute Mills Act Contracts to the City Manager or his designee. On October 22, 2014, the City Manager designated the City’s Planning Director to make, prepare and execute Mills Act Contracts and administer the Mills Act Program.

Pursuant to these changes in the City’s Mills Act Program,³ an owner of a qualified historical property who wants to participate in the program must submit an application to the City of Anaheim, which is then reviewed and approved by the City’s Planning Department. Upon the recommendation of the City’s Planning Department staff, a Mills Act Contract is

² See: <http://www.anaheim.net/planning/aRT/PlanCouncil-May2010.pdf>

³ *Ibid.*

prepared in consultation with the City Attorney (or the City Attorney's representative) and executed by the owner of a qualified historical property.

An approved application results in the formation of a Historic Property Preservation Agreement, which remains in effect for a minimum of ten years. The type of preservation conditions established by the Mills Act Agreement varies according to each property's specific needs, but all contracts must contain certain statutorily specified terms.

The City established a different rule for Planning Commissioner Ramirez. With respect to Planning Commissioner Ramirez's application for a Mills Act contract with the City, no City employee other than the Planning Director and the City Attorney (or his designee) will play a role in the application and contract process.

You also stated:

- Neither the Planning Director nor the City Attorney is subject to the supervision or control of the Planning Commission. The City Council is solely responsible for the appointment and removal of the City Attorney. The City Manager, who is subject to appointment and removal by the City Council, is solely responsible for the appointment and removal of the Planning Director.
- In addition, the City plays no role in the calculation of any property tax reduction for a qualified historical property. The owner of a property under a Mills Act receives a tax reduction on his or her property tax bill as calculated and assessed by the Orange County Assessor.
- There are a total of 1,475 contributing structures on the City's list of Structures of Historical Interest. From 2001 through calendar year 2013, the City entered into a total of 286 Mills Act Contracts. Based upon information obtained from the 2010 U.S. Census, there were 104,237 residential units within the City.

ANALYSIS

Conflict of Interest Under the Act:

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission uses a standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Your facts indicate that Planning Commissioner Ramirez (a public official under the Act) will not be making or participating in making decisions in her official capacity regarding approval of her Mills Act application as this decision will not come before the Planning Commission. Your facts indicate that Planning Commissioner Ramirez will act in her private capacity when seeking approval of her Mills Act contract with the City. Thus, the issue is

whether the Planning Commissioner, by submitting an application for a Mills Act Contract, could be “influencing” a governmental decision.

Influencing:

An official “attempts to use his or her official position to influence a decision” if “the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency.” (Regulation 18702.3.)

Two situations are considered to determine whether one is using his or her official position to influence a governmental decision.

The first is when a governmental decision is within or before the official’s own agency or an agency appointed by or subject to the budgetary control of the official’s agency. Regulation 18702.3(a) states that an official “is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.”

The second situation is when the governmental decision is before an agency that is not the official’s own agency or appointed by or subject to his or her own agency’s budgetary control. Under this situation, Regulation 18702.3(b) states that an “official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency.”

Your facts indicate that the second scenario applies, as the decision regarding Planning Commissioner Ramirez’s Mills Act application will not be decided by the Planning Commission, but rather by the Planning Director. The office of the Planning Director is not appointed by or subject to the Planning Commission’s budgetary control.

Accordingly, Planning Commissioner Ramirez may not attempt to use her official position and may not purport to be acting in her capacity as City Planning Commissioner to influence the decision in her contacts with the Planning Director or the City Attorney. For example, none of her written communications with either official may use stationery with the Planning Commission’s letterhead.

Exceptions

Regulation 18702.4(a)(1) also provides an exception to the definitions of making or participating in making a governmental decision. The exception exempts the following:

“Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself

on matters related solely to the official's personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1);"

Moreover, Regulation 18702.4(b)(3) provides:

"(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

"(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

"(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

"(B) A business entity wholly owned by the official or members of his or her immediate family.

"(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control." (Emphasis added.)

We have advised that this exception is very narrow and applies only those decisions where the official's personal economic interests will be affected and no one else but the official can represent his or her concerns relative to those interests. We have cautioned that comments should be strictly limited to the official's personal interests. In addition, the official should make clear that he or she is not speaking in the interest of any other person or group, and that he or she is not acting in an official capacity. (See *Simonian* Advice Letter, No. A-09-174 and *Adams* Advice Letter, No. I-06-129.)

Under your facts, Planning Commissioner Ramirez has wholly-owned real property. Therefore, she may appear before the Planning Director and/or City Attorney as any other member of the public and represent herself on matters related solely to the Mills Act application concerning her private residence.

Section 1090:

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike

at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ the following six-step analysis to determine whether the Anaheim City Planning Commissioner has a disqualifying conflict of interest under Section 1090.

Step One: Is the Planning Commissioner subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Planning Commissioners and their members are covered by this prohibition.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

Here, the decision at issue necessarily involves a contract because under the Mills Act, the Planning Commissioner must enter into a contract with the City of Anaheim in order to participate in the program and receive the property tax credits for the historical property.

Step Three: Is the Planning Commissioner making or participating in making a contract?

Your facts indicate that the Planning Commissioner will not in any way be participating in the review and approval process of the Mills Act contract involving her personal residence. As your letter points out, with respect to Planning Commissioner Ramirez’s application for a Mills Act contract with the City, “no City employee other than the Planning Director and the City Attorney (or his designee) will play a role in the application and contract process.”

Therefore, the Planning Commissioner would not be making or participating in making a contract for purposes of Section 1090.

We are mindful that there is “shared” staff between the City’s Planning Commission and its Planning Department. In prior advice we have found that when a controlling agency and

another body share the same staff, the other body is tantamount to being the same as the controlling agency and, consequently, is deemed to essentially share the budgetary control of the controlling agency. (See *Larmore* Advice Letter, No. A-00-275; *Martello* Advice Letter, No. A-85-190; *West* Advice Letter, No. A-88-413; and *Farrell* Advice Letter, No. I-03-121.)

In the *Hsiao* Advice Letter A-14-152, we found that a Trustee of the San Mateo County Board of Education could not make or participate in making contracts with school districts in San Mateo County under Section 1090 because governmental bodies such as the County Board of Education ultimately have the authority over the contracts made by a subordinate agency.

However, Planning Commissioner Ramirez's case can be distinguished from the facts set forth in the *Hsiao* Advice Letter, as she is not a member of a "controlling agency," but that of the subordinate body. The Anaheim Planning Commission, for instance, does not have authority over contracts made by the Planning Director and/or the City Council. Regulations interpreting the Act generally prohibit an official whose agency has budgetary control over another agency from appearing before the other agency to influence a decision in which he or she had a financial interest. (Regulation 18702.3(a) and (b).)

We note that you created a special process for Planning Commissioner Ramirez, as ordinarily the City's Planning staff evaluates properties for eligibility under the City's Mills Act Program. City Planning staff would normally make recommendations in consultation with the City Attorney, and determine if the specific properties subject to the City's Mills Act Contracts are in compliance.

For these reasons, we find the City may enter into Mills Act contract with Planning Commissioner Ramirez, as she is not making or participating in making a contract under Section 1090.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl